

CRIMINAL APPEAL NO. 179 OF 1990.

Date of decision: 6.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. M.J. Budhbhatti, advocate for the appellants.

Mr. K.P. Raval, APP for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

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February 6, 1996.

Oral judgment (Per Jain, J.)

The appeal arises from the order of conviction passed by the learned Additional Sessions Judge, Baroda in Sessions Case No.16 of 1984 wherein the present appellants/original accused Nos.1 and 2, were held guilty for the offence under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for

life. It may be stated that accused No.3 was also sentenced to undergo rigorous imprisonment for the offence under Section 324 of the Indian Penal Code but he is not before us as was released on probation and, therefore, we are not concerned with the conviction against accused No.3. It may also be made clear that the State has also not preferred any appeal against the judgment qua the accused No.3.

Mr. Budhbhatti, learned advocate for the appellants, has fair enough to urge the Court that in the facts and circumstances of the case, the conviction should have been passed under Section 304 Part I instead of Section 302 of the IPC and, therefore, has argued on this limited point only. Mr. Raval, learned APP, has vehemently opposed and has taken us through the evidence in detail so as to sustain conviction under Section 302 of the IPC.

In order to appreciate contention of Mr. Budhbhatti, it would be relevant to peep in the circumstances giving rise to the case.

According to the prosecution, one Devlabhai, uncle of complainant, Remla Dhedia and deceased Harlia Dhedia, had travelled for heavenly abode in natural course and, therefore, his dead body was taken to cremation ground. Several villagers assembled for consigning dead body to flames. The deceased, the complainant and the accused had also assembled there. The deceased Harlia Dhedia had mortgaged his agricultural field with accused No.2, Udhlabhai Fuljibhai Koli for a sum of Rs.800/- and that as he wanted redemption thereof he just initiated talks for redemption. In the course of talks, some hot exchange of words took place as a result of which the atmosphere got surcharged. In the meanwhile, in the passion of heat, accused No.2, the mortgagor, instigated accused No.1, Chhaganbhai Chuniyabhai, to give sound threshings. Owing to this instigation, accused No.1 inflicted injuries at left arm. The impact of blow was so forceful that the lower limb of left arm got detached and was found hanging just with the support of skin. Then second blow was inflicted over the left side of chest causing muscle deep injury. In the meanwhile, when the complainant, P.W.1, tried to intervene to save his brother, the deceased Harlia, accused No.3 also caused injuries upon his shoulder with sickle. The persons present there also tried to intervene and thereafter the accused fled away from the scene. With such serious injuries, deceased Harlia Dhedia, brother of the complainant, died on the spot only.

In this background, to consider the question of alteration of conviction, overtact and role played by individual accused will have to be ascertained first. It is not in dispute that accused No.1 inflicted injuries with axe at the instigation of accused No.2, Udhlabhai Fuljibhai Koli. Therefore, accused No.1 is the person one who has actually caused injuries and committed the offence and accused No.2 is the person who abetted commission of offence, therefore, accused No.2 can be held guilty under Section 114 of the IPC alongwith accused No.1. As per Section 114 of IPC abetter is liable to be punished as an abetter for the act or offence for which he would be punishable in consequence of the abetment committed. In other words, he shall be deemed to have committed the act abetted and shall be guilty for such act, irrespective of the fact that he did not physically participate by any overtact. Therefore, in our view, the accused No.2 is also guilty for the offence for which accused No.1 can be punished.

It is not the case of the prosecution that the accused had premeditation and had come there with common intention but as is evident from the record that the accused and deceased by coincident met each other at the funeral ground. Deceased initiated talk for redemption of his agricultural field mortgaged with accused No.2. Initiation of talk took ugly shape and got converted into heat exchange of words, ultimately, surcharging the atmosphere and, all of a sudden, accused No.2 instigated accused No.1 to give a soundthrest. By giving sound thrust we may say that accused No.2 did not intend to cause such injury which may result into death but may be to teach lesson to deceased Harlia Dhedia. In this background accused No.1 attacked Harlia with deadly weapon like axe. From this evidence it is clear that the accused were the aggressor and first to attack the prosecution side wherein some of the witnesses also tried to intervene to pacify but received injury as is evident from the testimony of P.W.1., Ramla Dhedia, the complainant. Though the accused are aggressor yet nothing can be attributed to the intention for causing such injuries which are sufficient to cause death.

At this stage, in support his case, learned APP has also invited our attention to cross-examination of P.W.1, wherein an attempt is made to casually bring in enmity between accused No.1 and this witness, that is, complainant. It is an admitted fact that the brother of accused No.1 was killed wherein the complainant was held guilty and convicted. This may be a reason for enmity between the complainant and accused No.2 but nonetheless

a circumstance to infer enmity between the deceased Harlia and, therefore, this enmity cannot influence and have impact on prosecution case. It is the deceased who had mortgaged his agricultural field with accused No.2 for a sum of Rs.800/- and had initiated talk for redemption when by coincident happen to meet him on the funeral ground and, therefore, we have no hesitation in holding that irrespective of alleged enmity though in fact not as contended by learned APP, the genesis of the incident is initiation of talks for redemption which surcharged the atmosphere. If this is so we fail to understand premeditation and or common intention or even to infer intention for causing such injury which may cause death. In this view of fact, in our view, the case is squarely covered by exception 4 to Section 300 and, cannot be said to be culpable homicide amounting to murder. Explanation to exception 4 of Section 300 further says that it is immaterial in such cases as to which of the parties starts provocation or commit the first assault and, therefore, even if the accused are the aggressors it would be immaterial and may not carry much weight and help the case of the prosecution to bring the case within the purview of Section 300 of the Indian Penal Code. Earlier part of Section 304 of IPC provides that whoever commits culpable homicide not amounting to murder is punishable for the offence and may be sentenced imprisonment for life or a term of 10 years and shall also liable to fine. As discussed above, we have held that this is a case of culpable homicide not amounting to murder as covered under exception 4 of Section 300. In our view, though the injuries have resulted into spontaneous death of the injured, the case is covered by Section 304 Part I as nothing can be inferred for having intention to cause such injuries which may result into death.

In support of his contention, Mr. Budhbhatti, learned advocate for the appellant, has relied upon the decision of the Supreme Court in the case of Hem Raj v. State (Delhi Admn.), reported in AIR 1990 SC 2252. The facts are almost identical and the conviction was altered from one under Section 300 to Section 304 Part II. But on facts, the case is distinguishable and, therefore, in our view, may not be much help to except to convert conviction from 300 to Section 304 Part I of IPC.

No more submission is made by Mr. Budhbhatti except as discussed above. Therefore, now, the question remains about sentence. While holding the accused guilty under Section 302 of IPC, the learned trial Judge has convicted them to undergo rigorous imprisonment for life. But as

the conviction is to be altered from Section 302 to 304 Part I, Mr. Budhbhatti has urged us that as the accused are in jail since May 1983, the period of sentence undergone would be sufficient as the period of sentence under Section 304 Part I of IPC. For the offence punishable under Section 304 Part I of IPC the accused can be sentenced to rigorous imprisonment for life or ten years. In this case, even taking a deterrent view, as the accused are in jail since more than 12 1/2 years, we feel that this period of sentence would be sufficient. The law also provides for imposing fine. Since the period of sentence undergone is for more than 12 1/2 years, that is, much more than the period of ten years, we are not inclined to impose any fine.

In the result, the appeal is partly allowed. The judgment and conviction passed by the learned Additional Sessions Judge for the offence punishable under Section 302 of the IPC is quashed and set aside and the accused are held guilty for the offence under Section 304 Part I of the IPC and are ordered to undergo sentence for the period they have already undergone. The accused are ordered to be set free forthwith if not required in any other case.

Appeal stands disposed of accordingly.